2010

Rebecca Vicchrilli v. Mark Christopher Tracy : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

Rebecca Vicchrilli	:	
	:	
Petitioner - Appellee,	:	Court of Appeals
	:	Case No:
	:	20100760-CA
v.	:	
	:	Trial Court Civil
	:	Case No.
	:	904400716
Mark Christopher Tracy,	:	Judge Samuel McVey
	:	
Respondent - Appellant.	:	

Reply Brief for Appellant Mark Christopher Tracy

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Utah Rules of Civil Procedure

Rule 4. Commencement of Action

(c) Contents of summons. The summons shall contain the name of the court, the address of the court, the names of the parties to the action, and the county in which it is brought. It shall be directed to the defendant, state the name, address and telephone number of the plaintiff's attorney, if any, and otherwise the plaintiff's address and telephone number.

Rule 6. Time

(b) Notice of hearings. Notice of a hearing shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application.

Rule 12. Defenses and Objections

(b) How presented. Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack

of jurisdiction over the subject matter, (2) lack of jurisdiction over the person.

ARGUMENT

I. The Trial Court was Not Vested with Personal Jurisdiction over Appellant

In support of the district court's exercise of personal jurisdiction over Tracy, Vicchrilli maintains that she did not redact the affidavit submitted in support of her application to the district court. She contends that the court summons served on Tracy "appear[s] to have been redacted by the serving entity removing Vicchrilli's address and phone number." Brief of the Appellee, p. 8 ln. 8-9. The inference to be drawn from this contention is that because an anonymous process server redacted necessary elements of the court summons, its defect occurred without Vicchrilli's knowledge and against her will.

This contention is however in direct contradiction to the facts presented by Vicchrilli herself before the district court. In particular, during that proceeding, Vicchrilli submitted to the court that "upon [Vicchrilli's] request, the court clerk redacted

Petitioner's address from her pleading" [R. 166 ln. 13-14]. While each version submitted for court adjudication is decidedly contradictory, both statements have two elements in common - each is equally implausible and each is without legal significance.

From the original document it is clear that Vicchrilli herself used both white correction tape and a black marker to redact the contact information required by Rule 4(c) URCP [R. at 120.] Such a practice can hardly be attributed to either a court clerk or a professional process server.

In addition to the irregularity in Vicchrilli's factual presentation, her contention also suffers from an incomplete legal analysis. Vicchrilli maintains that Rule 4(c) URCP is inapplicable in the present action. Rule 6(d) URCP, she maintains, "seems to apply to order to show cause action." Appellee Brief, p. 6 ln. 16-17. Despite the fact that Rule 6 URCP is designated with the title "Time" while Rule 4 URCP is given the

designation "Commencement of Action," the simple reference to a *ex parte* application in sentence 2 unquestionably refers to the requirements of sentence 1 which solely regulate the time between servicing the notice of hearing and the hearing date and not the commencement of legal action.

The only legal authority cited in support of such a broad interpretation of Rule 6 URCP is said to be found in State v. Hamilton, 70 P.3d 111 (Utah 2003). Utah courts are guided to construe the technical requirements of Rule 4 URCP in light of the "guiding principle" that only notice of the legal proceeding is required to properly commence legal action.

However, this argument is directly refuted by the jurisprudence of the United States Supreme Court, the Utah Supreme Court as well as this Court.

In Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982), the United States Supreme Court held

> [t]he requirement that a court have personal jurisdiction flows not from Art. III but from the

> Due Process Clause. The requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty. Insurance Corp., 456 U.S. at 702.

Therefore, it follows that before a defendant can be "hauled in front of court," both the requirements of Due Process as well as the strict rules of procedures must be fulfilled.

The Utah Supreme Court adhered to this rationale when it declared in Utah Sand & Gravel Prods. Corp. v. Tolbert, 402 P.2d 703 (Utah 1965) that the "proper issuance and service of a summons which is the means of invoking the jurisdiction of the court and of acquiring jurisdiction over the defendant is the foundation of a lawsuit." The Court then went on to state that

> the formalities of the summons and the matter of service prescribed by law are intended to assure the recipient the bona fides of the court process and the importance of his giving serious attention thereto. These cannot be supplanted by mere notice by letter, telephone or *any other such means* (emphasis added) Tolbert 402 P.2d at 705.

As such, the notion that a mere notice of a proceeding is sufficient is entirely unjustified to invoke a court's personal jurisdiction. Vicchrilli's argument that Tracy had ample notice of the proceedings and the required contact information was "available … upon request of a copy of the court file" is unavailing.

This Court has also put more weight on the side of a clear, adequate pleading requirement in Parkside Salt Lake Corp. v. Insure-Rite, Inc., 37 P.3d 1202 (Utah App. 2001). However, Vicchrilli contends that the ruling is not controlling. That case, she maintains, was an unlawful detainer action that is not applicable to an order to show cause proceeding. Again, Vicchrilli fails to comprehend the clear reasoning of this Court. Specifically, this Court found that while

> [s]trict adherence to this requirement [in an unlawful detainer action] may seem somewhat silly, especially in a case where the trial court signed a separate order shortening the answer time. It is not the prerogative of courts, however to ignore legislative mandates. This is especially true in the current context, involving as it does, both a summons and an

extraordinary remedy. Parkside, 37 P.3d at 1207.

Because of the importance of personal liberty in the hierarchy of "Life, Liberty and Property," an order to appear in court to show cause is more and not less critical in relation to the legislative mandates of civil procedure as mandated in Parkside.

Should this Court find the summons defective, Vicchrilli maintains in the alternative that Tracy failed to make a special appearance to contest the court's jurisdiction, and thus waived his right to contest the exercise of personal jurisdiction. Appellee's Brief p. 8-9. Authoritative support for this contention is said to be found in State Tax Comm. V. Larsen, 110 P.2d 558 (Utah 1941).

Regardless of the fact that Larsen was decided some 67 years before the last amendment to the Utah Rules of Civil Procedure, Vicchrilli overlooks the fact that Rule 12 (b) itself effectively overruled Larsen and subsequently stipulates when and how a defense against a court's jurisdiction is properly raised. Modeled

after the Federal Rules of Civil Procedure, it is now above debate that a party does not waive a properly raised defense under Rule 12 (b) FRCP by simultaneously arguing the merits of the case. Kerr v. Compagnie De Ultramar, 250 F.2d 860, 864 (2nd Cir. 1958).

While a waiver may be "deemed to occur when the totality of the circumstances indicates an intentional abandonment or relinquishment of a known constitutional right" as stipulated in Barnard v. Wasserman, 855 P2d 243, 247 (Utah 1993), Vicchrilli can point to no other action by Tracy reflecting an intentional abandonment of a known right. On the contrary, his motions on December 30, 2009, [R. at 126, Nr. 8] February 19, 2010, [R. at 134] and July 26, 2010 [R. at 216 Subhd. I] to quash the service of process adequately demonstrate that Tracy decidedly exhibited an intention not to relinquish a known constitutional right.

As such, Tracy properly raised and preserved his defense to the district court's lack of personal jurisdiction.

II. The Trial Court Failed to Determine that the Appellant was Factually Able to Comply with the Court Order and Thus its Finding of Contempt is Null and Void

Other than the brief statement on the general unemployment rate in the United States during the 1990s, Vicchrilli failed to point to any part of the record in which the district court addressed the solvency and thus the factual ability of Tracy to comply with the court order. While it is true that Tracy did briefly outline his employment history to the district court over a 20-year period, Tracy place of residence, dates of employment, and earnings were not addressed by the district court.

A ruling without a finding and statement of fact as to the ability to comply with a court order is null and void. State v. Bartholomew, 85 Utah 94, 98 (Utah 1934); State v. Kranendonk, 79 Utah 239, 246 (Utah 1932).

III. The Trial Court Erroneously Disallowed Evidence that Appellee Failed to Provide a Home and Financial Support to Minor Child and thus Forfeited Her Right to Claim Past Arrears

Vicchrilli appears not to have advanced an argument in regard to the fact that the district court properly excluded evidence that the minor child neither lived with nor received financial support from her.

IV. The District Court Failed to Set Off Expenditures Made by Appellant Directly to his Daughter for College Expenses

Vicchrilli appears to maintain that the district court is not vested with jurisdiction to set off past arrears against expenditures for college expenses. The authoritative support for this contention is purported to be found in Bate v. Bates, 560 P.2d 706 (Utah 1977). However, a closer review of the case reveals that the issue presented in Bates concerned the installment of alimony support and not past arrears. Likewise, Vicchrilli cites the case of Larsen v. Larsen, 561 P.2d 1077 (Utah 1977). However, that case addressed the

issue of whether a court could *ex post facto* alter support obligations for the future (to include Utah Code §78 B-12-109) -- a contention that is not an issue in the present case. Lastly, the ruling in Ross v. Ross, 592 P.2d 600 (Utah 1979), is purported as controlling in the present case. Nevertheless, a closer review reveals that the case concerned the terms of a divorce decree, and thus is arguably inapplicable in the present case.

The only case cited by Vicchrilli directly applicable to the present case discounts the validity of her argument. In Wasescha v. Wasesch, 548 P.2d 895 (Utah 1976), the Court specifically denied the right to claim back child support when the custodial parent did not herself provide support to the minor child. As such, the court affirmed the prerogative of Utah courts not to retroactively alter past obligations for the future, but rather to deem that a custodial parent effectively waived her right to claim back child support when she herself did not provide support. A

Utah court therefore retains equitable authority to relieve a custodial parent's right to claim back arrears.

A categorical denial of a right to set off expenses for the higher education of the emancipated child is neither a foregone conclusion in the State of Utah nor in many states which have expressly allowed such equitable relief.

CONCLUSION

Appellant Tracy respectfully requests that the Court vacate the judgment entered by the trial court in its entirety for lack of personal jurisdiction. Moreover, appellant Tracy respectfully requests that the Court offer the following guidance to the lower court in future litigation:

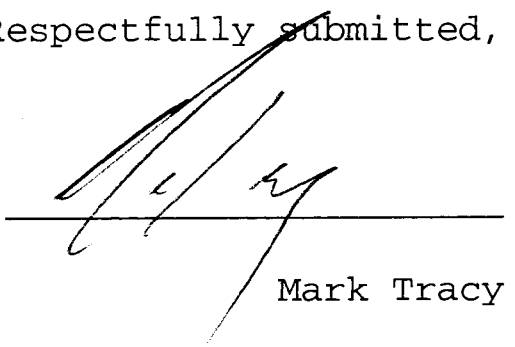
1) that a finding of solvency is necessary for a finding of contempt,

2) Tracy is allowed to present evidence that the minor child neither lived with not received support from Vicchrilli

3) and that the district court is required as a matter of law to set off expenses for college expenses paid to a child who has reached majority.

Dated this 4th day of April, 2011.

Respectfully submitted,



Mark Tracy

ADDENDUM

Pursuant to Rule 24(c) of the Utah Rules of Appellant Procedure no Addendum is necessary.

CERTIFICATE OF SERVICE

I certify that true and correct copies of the attached Reply Brief for Appellant Mark Christopher Tracy were served upon the party(ies) listed below by mailing it first class mail, personal delivery, or fax to the following addresses:

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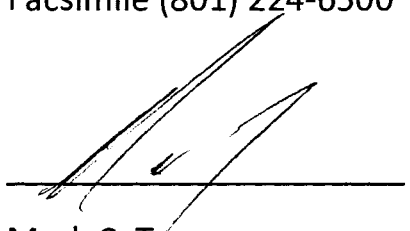

Mark C. Tracy
Appellant

April 4, 2011

Date